Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

JACQUELYN POUNDS,

Petitioner,

V.

DOUGLAS COUNTY
BOARD OF COMMISSIONERS,
ET AL.,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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48 pp

DID THE ELEVENTH CIRCUIT ERR IN USING A NEGLIGENCE STANDARD TO DETERMINE THE LIABILITY OF AN EMPLOYER FOR HOSTILE RACIAL ENVIRONMENT DISCRIMINATION BY A SUPERVISOR UNDER TITLE VII?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Jacquelyn Pounds, Plaintiff-Petitioner

2. Leonard Danley, Attorney for Plaintiff-Petitioner

3. Benton J. Mathis, Attorney for Defendant-Respondent

4. Douglas County Board of Commissioners, Defendant-Respondent

5. Rita Rainwater, Chairperson of the Board of Commission, Defendant-Respondent

6. Claude Abercrombie, Board Member, Defendant-Respondent

7. Jane Foust, Board Member, Defendant-Respondent

8. Bob Eidson, Board Member, Defendant-Respondent

9. Tom Wortham, former Board Member, Defendant-Respondent

10. Tommy Waldrop, Sheriff of Douglas County, Defendant-Respondent

11. Major Phil Miller, Head of Law Enforcement, Defendant-Respondent

12. Lt. Tim Brumbelow, Head of Investigations, Defendant-Respondent

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OPINIONS AND ORDERS OF LOWER COURTS

The order of the U.S. District Court for the Northern District of Georgia, Eleventh Circuit, dated March 7, 1997, granting Defendants' Motion For Summary Judgment, in part and denying in part is unreported and is reprinted herein as Appendix A. The Order of the U.S. District Court for the Northern District of Georgia, Eleventh Circuit, dated March 29, 1997, granting Defendants' Motion for summary judgment upon their reconsideration request, is unreported and is reprinted herein as Appendix B. The Order of the U.S. Court of Appeals for the Northern District of Georgia, Eleventh District, dated April 9, 1998, affirming the District Court's decision is unreported and is reprinted herein as Appendix C. The opinion of the U.S. Court of Appeals for the Eleventh Circuit Northern District of Georgia dated June 2, 1998, denying the petition for rehearing is unreported and reprinted herein as Appendix D.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Eleventh Circuit was filed on April 9, 1998. Petitioner filed a timely "Petition for Rehearing en Banc" on April 28, 1998, which was treated by the Eleventh Circuit as a petition for rehearing. Rule 35.6. That Court entered an order reciting that the Petition(s) for Rehearing are DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

STATUTES INVOLVED

42 U.S.C. § 2000(e) et seq. Title VII of the Civil Rights Act of 1964, and the Civil Rights Act of 1991.

PETITION FOR WRIT OF CERTIORARI

Jacquelyn Pounds petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the decision and judgment in *Jacquelyn Pounds v. Douglas County Board of Commissioners, et al.*, 11th Circuit Number 97-8323.

STATEMENT OF THE CASE

Petitioner, Jacquelyn Pounds, is an African-American female residing in Douglas County, Georgia. At the time of the acts that gave rise to Ms. Pounds' claims, she was employed with the Douglas County Sheriff's Department, Criminal Investigation Division (CID) as a Secretary II. (R.E. 55). Ms. Pounds was the only African-American secretary working for Respondent Douglas County Sheriff's Department. (R.E. 55). Ms. Pounds immediate supervisor was Defendant Lt. Tim Brumbelow, a white male.

Lt. Brumbelow reported directly to Major Phil Miller, a white male. (R.E. 57). At all times relevant to Ms. Pounds claims, Major Miller was in charge of the Law Enforcement Division for the Douglas County Sheriff's Department and reported directly to the Sheriff Tommy Waldrop. (R.E. 58).

Sheriff Waldrop, a white male, assumed the duties of Douglas County Sheriff on January 1, 1993. (R.E. 59). All of the Commissioners are white.

Ms. Pounds was initiatlly hired by Douglas County Board of Commissioners as a Clerk Typist II in December,

1989. (R.E. 55). Approximately two years later, she applied for and received the position of Secretary II in the CID of the Sheriff's Department. During her interview for that position, she was asked by former Chief Deputy Ron Shaddix how she would feel if she heard the word "nigger" used. (R.E. 55). Ms Pounds, thinking that Mr. Shaddix was refering to inmates using the word, replied, "I guess I could handle it." (R.E. 55).

Within one month of Ms. Pounds' acceptance of the Secretary II position, Ms. Pounds heard sworn personnel (deputies and a detective) use derogatory and racially offensive statements, such as "nigger" and "black ass" when speaking to African-American inmates. (R.E. 55).

When Sheriff Waldrop took office in January, 1993, the incidents intensified. Waldrop began with symbols. First, he placed a stuffed raccoon in the Jail's kitchen. Secondly, he placed a picture of a black man driving a wagon loaded with watermelons pulled by a team of mules with a little white boy riding on the back of the wagon in the dinning hall. Finally, at a time when black's were protesting the REBEL insignia on the Georgia State Flag as offensive, Waldrop, at the height of the "flag flap," ordered license plates bearing the state flag to be placed on the front of all Sheriff County patrol vehicles. Plaintiff contends this highly insensitive display of racial symbolism offended herself and like minorities of which Tommy Waldrop knew of and condoned.

Further, ence Sheriff Waldrop became Sheriff, use of the word "nigger" became more frequent in Ms. Pounds' presence. (R.E. 55). Ms. Pounds observed her supervisor's superior, Major Miller, say to an African-American officer, "Come here, nigger." (R.E. 55). Other sworn personnel, Sgt. Lashley, referred to Ms. Pounds as "Buckwheat." Detective Scotty Cosper indicated Ms. Pounds would be taken to lunch on "Black Wednesday" as opposed to the same day the white secretaries were taken out for lunch. (R.E. 55).

As the work environment worsened, Ms. Pounds grew

ill and received medical treatment for depression. She complained to her medical doctor, Lisa Ortenzi, M.D. who prescribed nerve pills, Zoloft and Xanax, and referred her to a psychologist, Dr. Harold Haddle. Dr. Haddle attributed Ms. Pounds' state of depression to her work environment and advised her to take an initial thirty (30) day leave. (R.E. 56). Dr. Haddle informed Sheriff Waldrop of his diagnosis and recommendation by letter. (R.E. 59).

A few days later while on medical leave, May 5, 1993, Respondent Brumbelow visited with Ms. Pounds at her home. During the visit, Ms. Pounds told her immediate supervisor abou the racism she was experiencing. (R.E. 55). Lt. Brumbelow reported Ms. Pounds' complaint to his immediate supervisor, Major Miller. During the conversation with Lt. Brumbelow, Major Miller admitted using the word "nigger" in Ms. Pounds' presence. (R.E. 57). During that same conversation, Major Miller instructed Lt. Brumbelow that notwithstanding Dr. Haddle's letter she should come back to work or tender her resignation. (R.E. 55). Although Dr. Haddle informed Plaintiff she was not well enough to return to work, believing she would be terminated if she did not return, Plaintiff returned on June 7, 1993. (R.E. 55).

Prior to Plaintiff returning to work she had on two different occasions discussed her problems with Major Miller, including telling him that her white colleague, Donna Hartsfield was "mean" to her. (Pla. Aff.). On Thursday, June 10, Plaintiff's third day back at work. Defendant Miller, while addressing Donna Hartsfield, the white secretary in Plaintiff's presence, stated "Come here, Meany." Hearing this, Plaintiff's natural inference was that Defendant Miller was mocking her and making light of her complaint that Donna Hartsfield was "mean" to her.

Plaintiff became sick and informed Defendant Brumbelow she was going home. Brumbelow consulted with Defendant Miller who sent word to plaintiff she should take an

early lunch and " cool off." Plaintiff explained that she was sick and was going home for the day. That evening Plaintiff received a Letter of Suspension pending termination from Phil Miller and was told to meet with Tommy Waldrop on Monday, June 14, 1993.

On Monday, June 14, 1993, Ms. Pounds met with Respondent Waldrop. During this meeting Ms. Pounds told Waldrop about the racial incidents, including, about Phil Miller calling Tim Pounds, an African-American deputy, "nigger" in her presence. Waldrop told Ms. Pounds that he did not know anything about that. He told her she should be thankful to have a job and that things are not like they used to be. Waldrop told Ms. Pounds that she should understand that some of these boys were "raised like that and they won't change overnight." Ms. Pounds asked Waldrop if she had a job and he stated, "as of right now your job is vacant." (R.E. at p. 6).

As a result of her termination, Ms. Pounds filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging inter alia that she was terminated because of her race, black. Ms. Pounds later requested a right to sue letter and on July 29, 1994, she filed her complaint in the United States District Court alleging she was subjected to racial discrimination, racial harassment and a racially hostile work environment which affected the terms and conditions of her employment. Further, Ms. Pounds alleges she was unlawfully terminated in retaliation for complaining of racial remarks made by her superiors in violation of her rights pursuant to **Title VII, 42 U.S.C. §2000e , et seq., 42 U.S.C. §1981 (a); §1981 and 42 U.S.C. 1983**.

Defendants answered Plaintiff's Complaint and the parties conducted discovery. On September 1, 1995, at the conclusion of discovery, Defendants filed a timely Motion For Summary Judgment. On October 19, 1995, pursuant to an Order extending her time to respond to Defendants' Motion For Summary Judgment, Plaintiff submitted her Brief In Opposition

To Defendants' Motion. On November 20, 1995, Respondents moved both for leave to submit a reply brief in excess of the page limit, and to strike portions of plaintiff's affidavit as a sham affidavit and the affidavit of Michael Zachery, an African-American detective with the Department, contending Ms. Pounds did not disclose Mr. Zachery as a witness and that his affidavit was inadmissible hearsay.

On December 5, 1995, John R. Strother, Jr., Magistrate Judge issued a Report and Recommendation that recommended Defendants' Motion For Summary Judgment be granted on all claims. In the Report, the magistrate noted that Ms. Pounds failed to file a response to Respondents' undisputed material facts although she alluded to her responses in her brief in opposition to their motion. Until this time, Ms. Pounds nor her counsel realized that her responses to Respondents undisputed material facts had inadvertently not been submitted with her response to Respondents' Motion for Summary Judgement. Ms. Pounds filed her objections to the Magistrates Report simultaneously with a Motion for Reconsideration with Ms. Pounds response to Respondents' undisputed facts attached. Plaintiff asked the Court to reconsider her response to the Defendants' Motion for Summary Judgment and allow her response to Defendant's undisputed material facts to be considered therewith.

On March 29, 1996, the U.S. District Judge, issued an Order (Appendix A) in response to Plaintiff's Motion for Reconsideration and Objections to the Magistrate's Report and Recommendation, and noted as significant Plaintiff's failure to submit her response to Defendants' undisputed material facts. The court DENIED Plaintiff's Motion for Reconsideration and GRANTED Defendants' Motion for Summary Judgment in part and DENIED in part.

Specifically, the District Court denied Defendants' motion to strike Plaintiff's Affidavit but granted their motion to strike the Affidavit of Michael Zachery. In striking Detective

Zachery's Affidavit, the Court disagreed with Defendants' assertion that the affidavit was hearsay but agreed with Defendants' assertion that the affidavit should not be allowed because Mr. Zachery was not listed as a witness in Plaintiff's interrogatory responses. Further, the Court GRANTED Defendants' motion as to all of Plaintiff's other claims, but DENIED Defendants' motion as to Plaintiff's racial harassment claim based upon a hostile work environment theory. In denying Defendants' motion as to Plaintiff's hostile work environment claim, the Court concluded that "...the court cannot agree with the Report's implicit finding that the incidents in which Plaintiff was addressed as 'Buckwheat' or informed that she would be taken to lunch on 'Black Wednesday' apart from the white secretary could constitute severe and offensive conduct of such a level to constitute racial harassment." As a result, on April 19, 1996 (Excerpt #44) Defendants' filed a Motion For Reconsideration arguing that Ms. Pounds should not prevail on her hostile work environment claim because she did not give notice to Respondents and the Magistrate failed to address this issue in his report. The Court granted Defendants' Motion For Reconsideration. In granting Defendants' Motion, the Court made it clear that "while the Court is willing the revisit issues initially raised on the Magistrate Judge that were not addressed either within his report or by this Court the Court **DENIES the Motion For Reconsideration to the extent Defendants continue to argue that the conduct at issue did not rise to a level that might constitute a hostile work environment.** (Appendix B). Therefore, Defendants' remaining argument in support of it's Summary Judgment Motion primarily rests upon whether or not Ms. Pounds failed to complain.

Upon reconsideration of Respondents' Motion the Court determined that Plaintiff did not provide notice to Respondents and therefore in it's Order of March 7, 1997 (Appendix B) granted Defendants' Motion For Summary Judgment in it's

entirety. Ms. Pounds appealed.

REASONS WHY THE WRIT SHOULD BE GRANTED

Respondents racially harassed Ms. Pounds. The existence of racial harassment in the workplace is proscribed by both Title VII and 42 U.S.C. section 1981, the statutes under which the Petitioner brings her claims. The language in Title VII which makes it unlawful for an employer to "discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment." Title 42 of the United States Code section 2000e-2(a)(1) has been interpreted to encompass discrimination in the form of racial harassment. **Patterson v. McLean Credit Union**, 491 U.S. 164, 180 (1989). Similarly, Section 1981's pronouncement that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts," as amended by the Civil Rights Act of 1991, also prohibits racial harassment in the workplace. Although in **Patterson**, **supra**, the Supreme Court concluded that the term "make and enforce contracts" did not encompass conduct arising "from the conditions of continuing employment" within the meaning of Section 1981, 491 U.S. at 176, Congress acted in 1991 to overturn this part of the decision as well other narrow interpretations of Section 1981 by the Supreme Court. **See Jackson v. Motel 6 Multipurpose, Inc.**, 130 F.3d 999, 1008 n. 17 (11th Cir. 1997)(and cases cited therein); (**Dennis v. County of Fairfax**, 55 F.3d 151, 155 (4th Cir. 1995); **Johnson v. Uncle Ben's, Inc.**, 965 F.2d 1363, 1372 (5th Cir. 1992). Specifically, the amendments to the Civil Rights Act which were enacted in 1991 define the term "make and enforce contracts" as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. section 1981(b); Civil Rights Act section 101.

The Supreme Court's recent pronouncements in **Faragher v. Boca Raton, supra**, and **Burlington Industries, Inc. v. Ellerth, 66 U.S.L.W. 4634 (U.S. June 26, 1998)(No. 97-569)** clarified the standards to be used by courts in determining the extent to which employers are liable for the harassment perpetrated by supervisory personnel.

In **Faragher** and **Burlington**, the Supreme Court revisited the question of employer liability only as it relates to harassment by supervisors. The Court reiterated in these decisions its prior holding in **Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1997)**, that agency principles controlled this issue. Noting that the circuits, in applying agency law, had come to diverging conclusions with respect to the degree to which an employer should be held responsible for conduct by supervisors of which it was not aware, the Court distinguished supervisor harassment that resulted in a tangible employment action from that which does not. **Faragher, 66 U.S.L.W. at 4652**; **Burlington 66 U.S.L.W. at 4640**. Further the Court seemed to say when a tangible employment action is taken, vicarious liability is always appropriate. **Faragher, 66 U.S.L.W. at 4651; Burlington, 66 U.S.L.W. 4639**. The court defined a tangible employment action as one which "constitutes a significant change in employment status, such as hiring, different responsibilities, or a decision causing a significant change in benefits." **Burlington, 66 U.S.L.W.** at 4639. In the present case, it is clear that a tangible employment action was taken as Ms. Pounds was terminated.

Petitioner suffered an adverse Employment action as a result of Respondent's racial Harassment.

Ms. Pounds' termination was recommended by Respondent Major Phil Miller. (R.E. 58). Major Miller reports directly to Sheriff Waldrop and is in charge of the Law

Enforcement Division, which includes, inter alia, the Investigations Division where Ms. Pounds worked. (R.E. 58, at 3-4, 11-12). At all times relevant to this action, Lt. Brumbelow was in charge of Investigations and reported directly to Major Miller. (R.E. 57, at 11-12). Although Lt. Brumbelow was Ms. Pounds' immediate supervisor, he did not recommend that Ms. Pounds be terminated, nor was he consulted nor asked his opinion as to whether or not she should be terminated. (R.E. 57, at 14-25, 16-23). The incident that gave rise to Ms. Pounds' termination happened on or about June 10, 1993. (R.E. 55).

As the record reflects, Ms. Pounds was placed on medical leave by psychologist Harold Haddle, PH.D. on April 28, 1993. (R.E. 56). Dr. Haddle diagnosed Ms. Pounds as suffering from depression and anxiety which he attributed to Ms. Pounds' work environment. (R.E. 56). Ms Pounds shared with Dr. Haddle many of the offensive incidents and derogatory comments she experienced at work, including the incident where Major Miller said to Officer Tim Pounds, "Come here, nigger" when Officer Pounds refused to answer to "Come here boy." (R.E. 56).

While out on leave Ms. Pounds received a visit from Lt Brumbelow. She shared with him the racial problems she was experiencing at work. (R.E. 55). Shortly thereafter, Lt. Brumbelow telephoned Ms. Pounds and told her he had shared the information with Major Miller. (R.E. 55). He further told Ms. Pounds that Major Miller wanted her back at work or she should tender her resignation. (R.E. 55, at 5).

Ms. Pounds, fearing she would lose her job and against the doctors orders, returned to work on Monday, June 7, 1993. Three days after she returned to work, Major Miller, while working on Donna Hartsfield's computer, said to Ms. Hartsfield,

"Come here, Meany." (R.E. 55). Donna Hartsfield was Ms. Pounds co-worker and Ms. Pounds had complained to Major Miller that Ms. Hartsfield was "mean" to her. Ms. Pounds perceived Major Miller's action as mocking her and making light of her complaints. (R.E. 55). Ms. Pounds became sick and informed Lt. Brumbelow she had to go home. (R.E. 55). Lt. Brumbelow informed Major Miller of Ms. Pounds' situation. Ms. Pounds was told by Lt. Brumbelow that Major Miller would allow her to take a long lunch and "cool off," but she had to return to work that day. (R.E. 55). Ms. Pounds did not return and that afternoon a sheriff's deputy brought Ms Pounds a memorandum from Major Miller, informing her that she was suspended pending termination. (R.E. 55). Major Miller's recommendation was accepted by Sheriff Waldrop on Monday June 14, 1993.

The Facts in the instant case are similar to Faragher.

Ms. Pounds contends she was terminated because she is black and complained about the racial attitude of her employer, specifically, Major Miller and other sworn officers in violation of her rights pursuant to Title VII of the 1964 Civil Rights Act as amended in 1991. In **Faragher**, the Petitioner made her complaints regarding sexual harassment as opposed to racial harassment. Nevertheless, the Eleventh Circuit has patterned its assessment of claims of racial harassment in congruence with the analysis described by the Supreme Court in **Meritor Savings Bank v. Vinson**, 477 U.S. 57 (1986) and **Harris v. Forklift Systems, Inc.**, 510 U.S. 17 (1993). **See, e.g., Edwards v. Wallace Community College**, 49 F. 3rd 1517 (11th Cir. 1995). Therefore, since the decisions in **Faragher** and **Ellerth** purport to emanate principally from the analysis in **Meritor Savings Bank**, logically when presented with the issue endorse the courts ruling in **Faragher** for claims of racial harassment.

In **Faragher** the Petitioner complained of her harassment to a friend. The friend did not tell his supervisor, Terry, about Ms. Faragher's complaint. In the instant case, unlike **Faragher**, Ms. Pounds told Lt. Brumbelow, her immediate supervisor, of the racial problems she was having. (R.E. 55). Also, unlike **Faragher**, Lt. Brumbelow apprised Major Miller of the problems Ms. Pounds was having in the workplace. (R.E. 56). However, Major Miller's response was that Ms. Pounds either come into work or face termination. (R.E. 55 at 5). Defendants lost any affirmative defense when they fired Ms. Pounds.

The United States Court of Appeals determined, in affirming the district court's grant of summary judgment to defendants, that Ms. Pounds failed to notify Respondents of the harassment she was experiencing. Ms. Pounds contends the Court erroneously applied the negligence standard and that Respondents were vicariously liable, as Major Miller had successively higher authority over her. Not only did Major Miller know about the abusive and hostile environment, he was an active participant.

Even assuming arguendo that the facts as set forth by the Court of Appeals are correct, Ms. Pounds still is entitled to a writ as the Court of Appeals in its decision in affirming relief to Respondents relied on **Faragher** which this honorable Court has rejected.

CONCLUSION

In light of **Faragher** and **Burlington**, Ms. Pounds is entitled to a writ of certiorari. She demands that this Court vacate the decision of the United States Court of Appeals for the Eleventh Circuit and remand.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ACQUELYN POUNDS,	:
	:
Plaintiff,	:
	:
	: Civil Action No.
OUGLAS COUNTY BOARD OF	:
OMMISSION, and its	: 1:94-CV-1990-JOF
embers, RITA RAINWATER,	:
hairperson, CLAUDE	:
BERCROMBIE, JANE FOUST,	:
OB EDSON, TOM WORTHAM,	:
dividually and in their	:
apacities, TOMMY WALDROP	:
dividually and in his	:
fficial capacity, as	:
heriff, MAJOR PHIL	:
ILLER, individually and	:
his official capacity	:
s Chief Deputy, TIM	:
RUMBELOW, individually	:
nd in his official	:
apacity,	:
	:
Defendants.	:

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ORDER

The matter before the court is the Report and Recommendation of Magistrate Judge John R. Strother, Jr. [34-1], and the motion for reconsideration [37-1], and objections thereto [37-2], as well as Defendants' unopposed, outstanding motions for leave to file a brief in excess of the page limits [32-1] and to strike the affidavits of Plaintiff and Michael Zachary [31-1].

I. STATEMENT OF CASE

Plaintiff Jacquelyn Pounds was a secretary/receptionist in the criminal investigation division of the Douglas County Sheriff's Department from November 18, 1990, until her termination on June 15, 1993. Plaintiff thereafter commenced this action, which alleges denial of her due process rights and unlawful discrimination based upon a racially hostile working environment, upon her terms and conditions of her employment, upon her termination as well as retaliation, based upon race in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a; 42 U.S.C. § 1981; and 42 U.S.C. § 1983.

Defendants moved for summary judgment on September 1, 1995 [19-1]. Pursuant to an order extending her time to respond to Defendants' motion, Plaintiff submitted her brief opposing summary judgment on October 19, 1995 [28-1]. On November 20, 1995, Defendants moved both for leave to submit a reply brief to Plaintiff's opposition brief in excess of the page limits [32-1], and to strike portions of the affidavit of Plaintiff as a sham affidavit and the affidavit of Michael Zachary because Plaintiff did not disclose him as a witness and the affidavit contains inadmissible hearsay [31-1]. The Magistrate Judge issued his Report and Recommendation that this court grant Defendants' motion for summary judgment and dismiss this action on December 4, 1995 [34-1]. It is significant that Plaintiff did not submit a

response to Defendants' statement of undisputed facts with her response brief or even prior to the date upon which the Report and Recommendation was issued.

A. *The Findings within the Report and Recommendation*

After outlining seven incidents involving racial epithets and race-based references made by inmates, officers, detectives and coworkers either directed at Plaintiff or in her presence, the Magistrate Judge found that the combined incidents were not sufficiently severe to constitute an abusive or hostile working environment. The Report therefore recommends that the court grant the summary judgment motion as to Plaintiff's hostile work environment claims based upon race.

In analyzing Plaintiff's discriminatory treatment claims, the Magistrate Judge determined that Plaintiff could not show that she was replaced by a person outside of her class so as establish her *prima facie* case under the McDonnell Douglas framework. Even if Plaintiff could meet this burden, the Magistrate Judge concluded that Plaintiff could not rebut Defendant's explanation that her dismissal was premised upon her failure to return to work after lunch as directed on June 10, 1993, and her prior absences. More importantly, with regard to both her termination and the terms and conditions of her employment, Plaintiff had failed to introduce any evidence to show that she was treated differently than employees within her division that were similarly situated based upon race. For these reasons, the Report recommends that the court grant Defendant's motion for summary judgment on Plaintiff's claims for discriminatory termination and discriminatory denial of job training and job assignments. In addition, because Plaintiff could not rebut the reason for her termination, and Plaintiff had not made any complaints regarding the alleged discrimination until the date of her discharge, the Report also recommends that the court grant the motion for summary judgment on Plaintiff's unlawful retaliation claim.

Finally, the Magistrate Judge addressed Plaintiff's claims of denial of due process. If Plaintiff were raising the claim for violation of the Georgia Constitution, the Magistrate Judge recommended that he court decline to exercise pendent jurisdiction over the sate law due process claim and dismiss it. If Plaintiff were alleging a substantive due process claim or a procedural due process claim under the United States Constitution, the Report recommends that the court grant summary judgment in favor of Defendants because employment rights are not protected under the auspices of substantive due process and Plaintiff received an adequate pre-termination meeting and a post-termination hearing.

B. *Plaintiff's Objections*

Plaintiff has raised four primary objections to the Report and Recommendation. First, Plaintiff admits to "inadvertently" failing to submit a timely response to Defendants' statement of undisputed material facts. Upon submitting its response for the first time, Plaintiff moves for the court to reconsider the matter and objects to the Magistrate Judge's findings in the absence of its response. Second, Plaintiff argues that the Report errs in finding that Plaintiff could not establish a *prima facie* case of racial harassment based upon a hostile work environment theory. Third, Plaintiff alleges that the Magistrate Judge failed to consider her disparate treatment claims for exclusion from seminars and a Secretary's Day lunch. Finally, Plaintiff challenges the Report's conclusion that Plaintiff failed to establish her *prima facie* case for discriminatory termination or rebut the legitimate nondiscriminatory reason defeating her termination and retaliation claims.

II. DISCUSSION

A. *Defendants' Motion to Strike Affidavits*

As a threshold matter, Defendants have moved to strike portions the affidavits of Plaintiff and Michael Zachary [31-1]. First, efendants contend that Plaintiff's affidavit is inherently inconsistent ith prior deposition testimony. In her affidavit, Plaintiff stated that she ld Lieutenant Brumbelow her problems "and revealed to him all of the cial problems [she] was experiencing." Aff. at 4. In contrast, during r deposition, Plaintiff clarified the "personal problems" she previously d discussed with Brumbelow as including the Miller incident in which called her brother-in-law a "nigger," the fact that she had an abortion, r husband's anger, and other "small talk." Plaintiff Dep. at 324. aintiff also appeared to mention that an employee called her Buckwheat." *Id.* at 325. Plaintiff, however, expressly stated that she d not discuss "the actual problem" because she did not trust anyone. . at 324. Thus, the extent that Plaintiff's affidavit represents that she scussed any incidents beyond the Miller's comment and the Buckwheat" incident, the court agrees that Plaintiff's affidavit is quite isleading. Yet, because Plaintiff clearly did discuss some racial cidents during Brumbelow's visit, the court cannot determine that the fidavit contradicts or is "inherently inconsistent" with previous stimony. *See Lane v. Celotex Corp.*, 782 F.2d 1526, 1530 (11th Cir. 86). Accordingly, Defendants' motion to strike Plaintiff's affidavit is ENIED.

As for Michael Zachary's affidavit, Defendants contend that two tements contained within are inadmissible hearsay. The court agrees. Yet, Defendants also raise issue with the fact that Plaintiff led to disclose Michael Zachary, or the name of any other witness, thin the answers to the mandatory interrogatories in contravention of cal Rule 201-2(a)(4). Plaintiff also failed to identify Zachary in sponse to Defendants' interrogatories requesting that she list those dividuals with knowledge of her allegations. For this reason, the court

GRANTS Defendants' motion in part and STRIKES the affidavit of Michael Zachary from the record.

B. *The Report and Recommendation*

Pursuant to 28 U.S.C. § 636(b)(1), this court shall conduct a *de novo* review of the issues raised within Plaintiff's objections. Aside from challenging the Report's interpretation of the seven incidents of alleged harassment, Plaintiff has directed her objections to the factual findings to the Magistrate Judge's inability to consider her response to Defendants' statement of undisputed facts. Local Rule 220-5(b)(2) clearly requires a party opposing a motion for summary judgment to attach a brief a separate and concise statement of undisputed material facts that responds to the moving party's statement of undisputed material facts. Plaintiff failed to comply with this rule at the time she filed her brief in opposition on October 19, 1995. As Plaintiff did not correct his oversight until after the Magistrate Judge had issued his Report, the Magistrate Judge was entitled to deem as admitted all of the material facts that were contained in Defendants' statement that Plaintiff failed to address or traverse. *See* L.R. 220-5(b)(2). Therefore, Plaintiff s objection and motion for reconsideration on this basis is wholly without merit. Plaintiff's motion for reconsideration of the Report and Recommendation is DENIED [37-1].

After careful consideration of the Report and matters herein, the court finds unavailing Plaintiff's objections to its findings on the discriminatory treatment, termination and retaliation claims. As the Magistrate Judge indicated, Plaintiff has failed to introduce evidence to rebut Defendants' explanation for her dismissal. The record also lacks any evidence that demonstrates that Defendants treated Plaintiff differently than similarly situated persons within her division on the basis of race. As the Report appears to be correct in law and in fact, the

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court ADOPTS the Report and Recommendation regarding these claims.

As for Plaintiff's racial harassment claim based upon the hostile environment theory, the court concurs that casual comments made by inmates or racial epithets used merely in the presence of Plaintiff will probably not support Plaintiff's action. However, the court cannot agree with the Report's implicit finding that the incidents in which Plaintiff was addressed as "Buckwheat" or informed that she would be taken to lunch on "Black Wednesday" apart from the white secretary could not constitute sever and offensive conduct of such a level to constitute racial harassment. Because the Report does not discuss Plaintiff's ability to establish any other aspect of her hostile environment claim, the court cannot determine as a matter of law that actionable racial harassment did not occur. Accordingly, the court REJECTS the Report's conclusion and DENIES Defendants' motion for summary judgment on this issue.

III. CONCLUSION

Defendants' motion for leave to submit a reply brief to Plaintiff's opposition brief in excess of the page limit is GRANTED [32-1]. Defendants' motion to strike Plaintiff's affidavit is DENIED; Defendants' motion to strike Zachary's affidavit is GRANTED [31-1].

As discussed above, the court ADOPTS the Report and Recommendation with regard to the due process, disparate treatment, termination and retaliation claims and with the sole exception that it REJECTS the Report's conclusions regarding the racially hostile environment harassment claim [34-1]. Plaintiff's objections are OVERRULED and Plaintiff's motion for reconsideration of the Report and Recommendation is DENIED [39-2, 39-1].

ABLE COPY

Accordingly, Defendants' motion for summary judgment is GRANTED as to the discriminatory termination, discriminatory treatment, unlawful retaliation, and due process claims; Defendants' motion for summary judgment on the claim for the racially hostile environment is DENIED [19-1].

SO ORDERED, this 29th day of March, 1996.

/s/ J. Owen Forrester
United States District Judge

Filed in Clerk's Office
U.S.D.C. Atlanta
March 29, 1996
Luther D. Thomas, Clerk
By: /s/ D. Wilford
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACQUELYN POUNDS, Plaintiff, vs. DOUGLAS COUNTY BOARD OF COMMISSIONERS, et. al., Defendants.	:	Civil Action No. 1:94-CV-1990-JOF

ORDER

The matter before the court is Defendant's motion for leave to file a motion for reconsideration [47-1], Defendant's motion for reconsideration [44-1], and Defendant's motion for oral arguments on the motion for reconsideration [45-1].

I. STATEMENT OF CASE

This action alleges the denial of Plaintiff's due process rights and unlawful discrimination based upon disparate terms and conditions of employment, upon Plaintiff's termination, upon a hostile work environment, as well as upon retaliation, all based upon race in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a; 42 U.S.C. § 1981; and 42 U.S.C. § 1983. Defendants filed a timely motion for summary judgment [19-1], after which Magistrate Judge John R. Strother, Jr., issued a Report and Recommendation that recommended that this court grant Defendants' motion for summary judgment on all claims [34-1]. In an order issued on March 29, 1996 [31-1], however, this court did not fully

adopt the Report and Recommendation. Although the court agreed that Defendants were entitled to a judgment as a matter of law on Plaintiff's discriminatory treatment, termination, retaliation and due process claims, the court did not accept the Report's implicit finding that a number of incidents, including ones in which Plaintiff was addressed as "Buckwheat" or informed that she would be taken to lunch on "Black Wednesday" apart from a white secretary, could not constitute severe and offensive conduct to sustain a "hostile work environment" claim. Inasmuch as the Magistrate Judge had based his recommendation for summary judgment on Plaintiff's racial harassment claim solely upon the offensiveness and severity of the conduct at issue, the court denied the summary judgment motion as to this one claim. The court did not return to the merits of the hostile work environment claim or address the specific issues that Defendants had initially raised to the Magistrate Judge within their motion for summary judgment. Accordingly, Defendants have moved for reconsideration.

II. DISCUSSION

As an initial matter, this court agrees that a motion for reconsideration is an appropriate vehicle through which the court may address those issues within the summary judgment motion that it has not yet addressed. The court thereon GRANTS Defendants' unopposed motion for leave to file a motion for reconsideration out of time [47-1] and GRANTS IN PART Defendants' motion for reconsideration [44-1]. While the court is willing to revisit issues initially raised to the Magistrate Judge that were not addressed either within his Report or by this court, the court DENIES the motion for reconsideration to the extent Defendant continues to argue that the conduct at issue did not rise to a level that might constitute a "hostile work environment." Defendant's remaining argument in support of its summary judgment motion primarily rests upon Plaintiff's failure to complain.

Accordingly, a discussion of the underlying facts and Defendants respondeat superior liability follows *infra.*

A. The Named Parties

Plaintiff Jacquelyn Pounds was employed in the position of secretary and receptionist in the Criminal Investigations Division of the Douglas County Sheriff's Department from November 18, 1990, until her termination on June 15, 1993. Plaintiff has named the following persons and entities in their individual and official capacities as Defendants in this action: Douglas County Sheriff Tommy Waldrop, Major Phil Miller, Chief Deputy Lieutenant Tim Brumbelow, the Douglas County Board of Commissioners, and its members Rita Rainwater, Claude Abercrombie, Jayne Foss, Bob Eidson and Tom Wortham. Major Miller reported directly to Sheriff Waldrop and was in charge of the Law Enforcement Division, which included *inter alia*, the Investigations Division where Plaintiff worked. Miller Dep. at 3-4, 11-12. At all times relevant to this action, Lt. Brumbelow was in charge of the Investigations Division and reported directly to Major Miller. Brumbelow Dep. at 11-12. Brumbelow therefore was Plaintiff's immediate supervisor. *Id.*

It is significant to note that Plaintiff may not proceed under Title VII against Defendants in their individual capacities. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991)(relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act.")(citations omitted); *see also Harris v. Shelby County Board of Education*, 99 F.3rd 1078, 1083 n.3 (11th Cir. 1996).[1] Accordingly, for its analysis of

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[1] Similarly, no viable § 1983 claim may arise under the theory of respondeat superior liability. *Harris*, 99 F.3d at 1083. n.3.

Title VII liability, the court will presume that Plaintiff merely has named the individual Defendants in their role as supervisory employees acting as agents of the employer in the above-style action in an attempt to frame her action against her employer. *See id.*

B. *Background of the Racially Derogatory Remarks*

The incidents upon which Plaintiff relies to assert her hostile work environment claim involves a series of allegedly race-based comments occurring within the office during her tenure that were either directed to or overheard by Plaintiff. Plaintiff first overheard a white inmate tell another white inmate "let the nigger do it." Plaintiff Dep. at 66-67. Next, Plaintiff heard two white officers talking about bringing dogs into the jail cell to scare the inmates. *Id.* at 68-69. Based in part upon the fact that "most of the inmates were black," Plaintiff construed this discussion as a racially derogatory reference to times in which dogs were turned loose on black civil rights marchers. *Id.* Plaintiff also overheard Stan Copeland refer to an inmate as a "black ass." Plaintiff Dep. at 108-09. An unidentified female detective once indicated assignment of duties by reciting " 'eenie meenie miney mo, catch a black by the toe . . .' " *Id.* at 73-74. Plaintiff has stated that the "blank" is traditionally filled by the word "nigger" but that the detective omitted the epithet in Plaintiff's presence. *Id.* at 74. Finally, Plaintiff also overheard Chief Deputy Major Phil Miller talking with her brother-in-law , Officer Tim Pounds, saying "[c]ome here, nigger", Officer Pounds, who also worked for Douglas County Sheriff's Department, subsequently explained this behavior to Plaintiff as merely joking and teasing, but Plaintiff understood the conversation as harassment. Plaintiff Dep. at 98-100. As for the comments directed towards Plaintiff, Plaintiff has testified that Detective Scott Casper indicated that although the officers were taking the white secretary in the Investigations Unit to lunch on Tuesday, they would take Plaintiff to lunch

for Secretary's Day on "Black Wednesday." Plaintiff's Dep. at 92-93. Plaintiff also averred that on another occasion Sergeant Billy Lashley called her "Buckwheat." *Id.* at 104-06.

C. *Defendants' Liability for the Hostile Work Environment*

Defendants rely largely upon the fact that Douglas County had an equal employment opportunity policy in place, a copy of which was posted on the Sheriff's Department bulletin board and of which Plaintiff was aware. Plaintiff's Dep. at 29-30, 85-88. In addition, Plaintiff had received and skimmed through the Douglas County Merit System Handbook, *id.* at 85, 89-50, which outlined the procedures for employee grievances and appeals. Yet, despite the above-alleged racially derogatory incidents providing the basis of Plaintiff's hostile work environment claim, Plaintiff has admitted that she never complained orally or in writing to anyone within the Douglas County Sheriff's Office regarding her treatment prior to visiting the EEOC office.[2] Plaintiff Dep. at 90, 107, 169--74. Although Plaintiff claims to have kept contemporaneous written notes regarding the derogatory incidents she experienced during her tenure, *id.* at 70-72, the record indicates that Plaintiff first notified Sheriff Waldrop about the use of racially derogatory comments during the meeting on June 14, 1993, to discuss her proposed termination. Waldrop Aff. at paragraph 11.[3] The court has

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[2] Plaintiff has asserted that she did not feel comfortable telling anyone in a supervisory capacity of her complaints. Plaintiff Dep. at 90-91.

[3] Within his affidavit, Waldrop also testified that he looked further into Plaintiff's allegations by discussing the racial epithet with Miller and instructing him not to use the word again even in jest. Waldrop Affi. at paragraphs 14-15; *see also* Waldrop Dep. at 20.

not found any evidence that Plaintiff previously notified Brumbelow of her complaints regarding these racially derogatory comments.

In the absence of complaints regarding the above incidents, Defendants argue that they are insulated from liability by virtue of Douglas County's policy prohibiting racial discrimination and harassment. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), however, the Supreme Court rejected the idea "that the mere existence of a grievance procedure and a policy against discrimination, coupled with . . . [a plaintiff's] failure to invoke that procedure" provides absolute insulation from liability. *Id.* at 72; *see also Cross v. State of Alabama*, 49 F.3d 1490, 1506 (11th Cir. 1995) (citation omitted). Furthermore, like in *Meritor*, [4] the equal employment policy in the instant case was only a general policy that did not address the particulars of harassment. *See Meritor*, 477 U.S. at 72.[5] Although these facts are highly relevant, the court cannot find the existence of the equal employment policy or Plaintiff's utter failure to file a grievance wholly dispositive of this matter.

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[4] Like the grievance policy in *Meritor*, the grievance policy in the case at bar did require Plaintiff to present her complaint first to her immediate supervisor. Douglas County Code, § 13-113(a). A critical factual distinction exists between this case and *Meritor*, however, based upon the fact that Plaintiff's immediate supervisor, Lieutenant Brumbelow, was neither responsible for nor a participant in creating the "hostile work environment" at issue. *Cf. Meritor*, 477 U.S. at 72-73. Given that Plaintiff did not initiate the grievance procedures, the court has determine that Douglas County implemented a reporting system that did not discourage Plaintiff from reporting the alleged harassment.

[5] Section 13-16 of the Douglas County Code provides:
It is the policy of the county to provide equal employment opportunity to all persons and to prohibit discrimination in employment because of race . . . . This policy applies to and is a basic party of every aspect of the county's personnel policy and practices in the employment, development, advancement and treatment of employees.

Inasmuch as Plaintiff's remaining claim sets forth allegations of a hostile work environment based upon comments directed by or to her coworkers, the court only needs to analyze whether her employer is indirectly liable for the actions of its employees. Assuming *arguendo* that Plaintiff can establish her *prima facie* case of racial harassment under a hostile environment theory, indirect liability exists "if the employer knew or should have known of harassment and failed to take prompt remedial action." *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *Vance v. Southern Bell Tel. 7 Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). Plaintiff may meet this burden through evidence that 91) she complained to higher management, or (2) that "the harassment was pervasive enough to charge the employer with constructive knowledge." *Vance*, 863 F.2d at 1512.

Upon review of the record, however, the court concludes that Plaintiff cannot show that her employer had or should have had knowledge of the alleged harassment through either means. As discussed *supra*, Plaintiff cannot establish that she complained to any person in a supervisory role at the Sheriff's Department so as to put Defendants on notice of the alleged harassment. As for evidence pointing to the employer's constructive knowledge, the record provides little evidence suggesting that the conduct at issue was pervasive enough to impute constructive knowledge of racial harassment.[6]

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[6] The issue of whether the circumstances of the harassment and the conduct alleged might constitute an abusive work environment is a separate inquiry from whether the conduct is pervasive enough for a court to impute constructive knowledge to the employer. *Faragher*, 76 F.3d at 1167.

The evidence upon which Plaintiff relies to show Defendant's knowledge of racial harassment first fails to provide a solid evidentiary basis to determine Defendant's knowledge of the harassment. For example, nothing in the record suggests that any of the Defendants knew about a majority of the incidents at issue, including the discussion about scaring inmates with dogs or "Buckwheat," "black ass," or the "eenie meenie miney mo" references. Although Plaintiff did testify during her deposition that Lieutenant Brumbelow was present in the room when Detective Casper made the reference to the "Black Wednesday" lunch, a leap of faith is required to conclude that both Brumbelow heard Casper's comment and knew the effect that it had on Plaintiff. Plaintiff has also averred that Sheriff Waldrop previously had observed Major Miller jesting with Officer Pounds and calling him a "nigger." Plaintiff's Brief in Opposition to the Motion for Summary Judgment at 6. Yet, upon this court's review of the cited portion of the deposition, Waldrop clearly testified that he had never heard Miller use the word "nigger." Waldrop Dep. at 20.[7] Similarly, Major Miller and Lieutenant Brumbelow had limited knowledge of the racially derogate remarks about which Plaintiff has complained. For example, Major Miller stated under oath that the extent that the word "nigger" was used in the Sheriff's Department included his use of the word to Officer Tim Pounds, Tim pounds' use of the word, and use of the word among the inmates. Miller Dep. at 29-30. Lieutenant Brumbelow verified that although inmates used the word more often, use of the word "nigger" by employees was rare. Brumbelow Dep. at 20. Thus, the record does not support the conclusion that Sheriff had prior knowledge of Major Miller's use of a racial epithet to Officer Pounds or that employees' use of derogatory racial epithets was extensive within the Department.

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[7] Waldrop, however, did admit that he had discussed the "jesting" with Pounds and Miller and that he had told them "that it had to stop." *Id.*

Second, given that the record shows that Sheriff Waldrop did direct Officer Pounds and Major Miller to discontinue their conduct upon learning of their "jesting," there is not evidence suggested that Defendants condoned such inappropriate behavior. *See, e.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412 (10th Cir. 1987) (affirming grant of summary judgment on racial hostile environment claim in favor of defendant where record indicated only specific statements and use of epithet by coworkers buy there was an absence of evidence indicating defendant condoned such behavior).

Finally, Plaintiff's hostile environment claim is based upon seven statements by a variety of different individuals over nearly a three-year span during Plaintiff's employment in the Sheriff's Department. Although the court does not question that an individual might find these comments derogatory, offensive, and wholly unwelcome in the work place, the totality of the circumstances surrounding these incidents and the time period in which they occurred do not warrant a finding of egregiousness such that this court must impute constructive knowledge to Defendants.

For these reasons, the court concludes that Plaintiff cannot show that Defendants knew or should have knows of the alleged racial harassment or failed to take prompt remedial action. Accordingly, the motion for summary judgment is GRANTED on the hostile environment claim based on racial harassment [19-1].

III. CONCLUSION

Defendant's motion for leave to file a motion for reconsideration is GRANTED [47-1]. Defendant's motion for oral arguments is DENIED [45-1]. Defendant's motion

for reconsideration is GRANTED IN PART and DENIED IN PART [44-1].

In addition, the court hereby MODIFIES its order of March 29, 1996, to the extent that the court GRANTS Defendants' motion for summary judgment in its entirety [19-1].

SO ORDERED, this 7th day of March, 1997.

/s/ J. Owen Forrester
UNITED STATES DISTRICT JUDGE

Entered on Docket
March 13, 1997
By L.D.T., Clerk
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8323

JACQUELYN POUNDS,

Plaintiff-Appellant,

versus

DOUGLAS COUNTY BOARD OF COMMISSIONERS, and its members; RITA RAINWATER, Chairperson, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before COX and HULL, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT Plaintiff - Appellant pay to Defendants-Appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 9, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: JUNE 10, 1998

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8323

D.C. Docket No. 1:94-CV-1990-JOF

JACQUELYN POUNDS,

Plaintiff-Appellant,

versus

DOUGLAS COUNTY BOARD OF COMMISSIONERS, and its members; RITA RAINWATER, Chairperson, et. a.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(April 9, 1998)

Before COX and HULL; Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIUM:

Plaintiff-appellant Jacquelyn Pounds ("Pounds") sued the Douglas County Board of Commissioners, its members, and its chairperson (collectively "Douglas County" or "the County") alleging claims under: (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e; (2) 42 U.S.C. 1981; and (3) 42 U.S.C. 1983. The district court granted Douglas County summary judgment on all claims. We affirm.[1]

I.

Pounds, an African-American female, was employed by the Douglas County Sheriff's Department as a secretary in the Criminal Investigation Division from November 1990 through June 1993. Pounds argues that during her tenure in the Sheriff's Department she was subjected to a racially hostile environment, specifically alleging that in her presence; (1) a white inmate in the jail stated, "Let the niggers do it"; (2) two unidentified white male Douglas County officers suggested that, in an effort to deter the incidence of drugs and cigarettes in jail, police dogs should be brought into the jail to "scare them";[2] (3) an unidentified female employee of Douglas County once remarked, "Eenie, meenie, miney, mo, catch a blank by the toe";[3] (4) Major Stan Copeland referred

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[1] Pounds also appeals the district court's decision to strike the affidavit of a witness not identified by Pounds during discovery and the court's denial of her motion for reconsideration of the magistrate judge's acceptance of the County's statement of undisputed facts. We conclude that these claims lack merit and need no discussion.

[2] Pounds interpreted this statement as a racially derogatory reference to times when dogs were turned loose on black civil rights marchers. See Pounds Dep. at 68-69.

[3] Pounds testified in her deposition:

> Well, because that little slogan, "Eenie, meenie, miney, mo, catch a 'blank' . . . ," usually the

to an inmate as "black ass"; (5) Scott Cosper, a Douglas county employee, used the phrase "Black Wednesday," a reference to a boycott of local stores proposed by local black leaders, with regard to taking Pounds to lunch for Secretaries Day; (6) a co-worker once called her "Buckwheat"; and (7) in a conversation between Major Phil Miller and Pounds's brother-in-law, Tim Pounds ("Tim"), also an employee, Miller said to Tim, "Come here, nigger."[4]

Pounds contends that she was disturbed by and became depressed as a result of the racially offensive attitudes and office environment. She did not, however, complain to anyone during her tenure for fear of losing her job, even though she was aware of an official Douglas County policy prohibiting racial harassment. The record indicates that Pounds first notified Sheriff Waldrop about the presence of the racially offensive work environment immediately prior to her termination, during a meeting in which the two discussed Pounds's proposed termination.

Pounds sued Douglas County in district court alleging discriminatory treatment, termination, and retaliation and denial of due process, in violation of Title VII, 42 U.S.C. 1981, and 42 U.S.C. 1983. The district court ultimately granted summary judgment on all claims,[5] and Pounds appeals that order only as it relates to her Title VII claim.

> "blank" is filled in with "nigger," and I knew that. But, she said, "blank" instead of saying the word, and I found it very offensive.

Pounds Dep. at 74.

[4] Miller later apologized to Pounds that she had overhead the statement, and Tim explained to her that "the comment was a joke" and that Tim "treated Miller the same way." Report and Recommendation at 5.

[5] The magistrate judge issued a report and recommendation suggesting that all of Pounds's claims should be dismissed, specifically finding the allegations of harassment not severe enough to constitute a hostile

This court reviews a district court's order granting summary judgment de novo. See N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1559 (11th Cir. 1990). We review the record in the light most favorable to, and with reasonable inferences taken in favor of, the nonmoving party. See Golden v. Mobil Oil Corp., 882 F.2d 490, 493 (11th Cir. 1989).

Title VII is violated when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (internal quotations and citations omitted). The conduct must be severe or pervasive enough to create an "objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive." Id. Whether an environment is hostile or abusive can be determined only by reviewing all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 371. We need not decide whether the incidents described above satisfy the frequency and severity requirements of the statute, however, because Pounds failed to satisfy the notice requirement of Title VII.

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environment. The district court originally granted summary judgment to the County on all claims except the claim of racial harassment based upon a hostile work environment, finding that, viewing the evidence in Pounds's favor, the incidents of discrimination were in fact severe enough to constitute racial harassment. Upon reconsideration, the court granted summary judgment on the hostile work environment claim because Pounds could not prove that Douglas County had actual or constructive knowledge of the alleged harassment.

An employer can be held liable under Title VII only if it knew or should have known of the harassment and failed to take prompt remedial action. See Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1512 (11th Cir. 1989), appeal after remand, 983 F.2d 1573 (11th Cir. 1993). A plaintiff may meet this burden by showing either that the employer had actual knowledge of the harassment or that the harassment was pervasive enough to charge the employer with constructive knowledge. See id. Because Pounds failed to create a genuine issue of material fact about whether Douglas County had actual or constructive knowledge of the discrimination, the district court properly granted summary judgment to the County. In this case, six isolated incidents potentially attributable to the County occurred over the course of two and one half years and were not pervasive enough to have charged the County with constructive knowledge of the hostile environment. Cf. Faragher v. City of Boca Raton, 111 F.3rd 1530, 1538 (11th Cir.) (en banc) ("The question of notice to the employer is distinct from the question of the environment's abusiveness.") cert. granted, 118 S. Ct. 438 (1997). As such, Douglas County can be held liable under Title VII only if the County had actual knowledge of the hostile environment.

Pounds wholly failed to present any evidence indicating that Douglas County had actual knowledge of the harassment. Although Pounds alleges generally that Douglas County had actual knowledge of the harassment, the record does not support such an inference. Throughout her tenure, Pounds did not complain to anyone about the harassment and only reported the incidents immediately prior to her termination, rendering prompt remedial action impossible. Likewise, the deposition testimonies of Sheriff Waldrop, Major Miller, and Lieutenant Brumbelow reveal that the racially derogatory remarks about which Pounds now complains were not known to any of the three individuals.

Because Douglas County did not have actual or constructive notice of the alleged hostile work environment, the district court properly granted summary judgment to Douglas County. The district court's order is therefore AFFIRMED.

Filed
U.S. Court of Appeals
Eleventh Circuit
April 09, 1998
Thomas K. Kahn, Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8323

JACQUELYN POUNDS,

Plaintiff-Appellant,

versus

DOUGLAS COUNTY BOARD OF COMMISSIONERS, and its members; RITA RAINWATER, Chairperson, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

Before COX and HULL, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant JACQUELYN POUNDS is denied.

ENTERED FOR THE COURT:

/S/
SENIOR UNITED STATES CIRCUIT JUDGE

APPENDIX E

The relevant portion of Section 1981 reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, the parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The relevant portion of Title VII reads:

> It shall be and unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to her or his compensation, terms, conditions, or privileges of employment, becausse of such individuals . . . race . . .; or (2) to limit, segregate, or classify her or his employees or applicants for employment in any way which would deprive or tend to deprive any individual of empoloyment opportunities or otherwise adversely affect his or her status as an employee because of such individuals . . . race.

Supreme Court, U.S.
FILED
DEC 16 1998
CLERK

No. 98-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JACQUELYN POUNDS,

Petitioner,

vs.

DOUGLAS COUNTY BOARD OF COMMISSION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE ISSUES

1. Did the Eleventh Circuit Court of Appeals properly affirm the decision of the district court to grant summary judgment in favor of the Respondents?

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STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition In The Courts Below

Petitioner Jacquelyn Pounds brought suit alleging a denial of her due process rights and unlawful discrimination and retaliation based upon her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended ("Title VII") and 42 U.S.C. §§ 1981 and 1983. At the conclusion of discovery, Respondents (hereinafter "Respondents" or "Douglas County") moved for summary judgment. (R2-19).

On December 1, 1995, the United States Magistrate Judge issued his report and recommendation that Douglas County's motion for summary judgment be granted in its entirety and that the case be dismissed. On March 29, 1996, the district court adopted the majority of the Magistrate's conclusions and ordered that Douglas County was entitled to summary judgment on all claims raised by Petitioner with the exception of her Title VII claim of racial harassment based upon a hostile work environment. (R4-41-7-8).

On April 19, 1996, Douglas County timely moved for reconsideration of the district court's Order denying summary judgment on Petitioner's racial harassment claim. (R4-44). On March 7, 1997, the district court entered an Order granting Douglas County summary judgment on Petitioner's remaining hostile environment claim. (R4-49). Based upon a lack of any significant evidence of pervasive racial harassment, the district court concluded that the record failed to support a finding of constructive or actual knowledge of the alleged racial harassment and that Douglas County was thus insulated from liability. (R4-49-10).

In reaching its final conclusion to grant summary judgment in favor of the Respondents, the district court agreed with Douglas County that there was no evidence within the record which would support a proposition that Douglas County "knew or should have known" of the alleged harassment yet failed to take prompt remedial action. The district court concluded that the totality of circumstances presented — seven statements allegedly made by various individuals (including prisoners and non-supervisory personnel) over a three year time span, all of which were unknown to managers within the Douglas County Sheriff's Department — could not support a finding of egregious behavior sufficient to impute constructive knowledge of the alleged misconduct to Douglas County. A judgment in favor of Douglas County was entered by the United States District Court for the Northern District of Georgia on March 13, 1997.

Significant for purposes of this Petition, the district court found that Douglas County maintained, and Petitioner was aware of, a policy prohibiting discrimination in employment on the basis of race. This policy was found by the district court to "not discourage [Petitioner] from reporting the alleged harassment." (R4-49 at note 4). The district court further determined that Petitioner utterly failed to initiate any grievance based upon the alleged discrimination. (R4-49-7).

Petitioner appealed the dismissal of her Title VII claims to the United States Court of Appeals for the Eleventh Circuit on April 7, 1997. (R4-52). In her appeal before the Eleventh Circuit, Petitioner urged for a finding of error based upon the district court's conclusions that the record failed to establish that Douglas County knew or should have know of the alleged racial harassment against Petitioner or that Douglas County failed to take prompt remedial action upon being advised of such conduct. Petitioner did not appeal any of the issues or

findings contained within the district court's first Order, dated March 29, 1996. (R4-41).

In a per curium decision, the Eleventh Circuit upheld the granting of summary judgment in favor of Douglas County. The court ruled the Plaintiff had failed to establish any facts sufficient to demonstrate that Douglas County had actual knowledge of the harassment or that the harassment was sufficiently pervasive to charge Douglas County with constructive knowledge.

> Pounds wholly failed to present any evidence indicating that Douglas County had actual knowledge of the harassment. Although Pounds alleges generally that Douglas County had actual knowledge of the harassment, the record does not support such an inference. Throughout her tenure, Pounds did not complain to anyone about the harassment and only reported the incidents immediately prior to her termination, rendering prompt remedial action impossible.

(Appendix C).

Petitioner hereafter apparently sought a rehearing of this decision by the Eleventh Circuit (counsel for Respondent was not served or notified of any such request) and reconsideration was declined by the Court on June 2, 1998.

B. Statement Of The Facts

Because Petitioner has misstated several facts within the record, Respondents, pursuant to Rule 15.2, state the relevant facts for purposes of this appeal. Many of the asserted facts relied upon by Petitioner are based upon presumed inferences

from her affidavit testimony submitted in response to Douglas County's motion for summary judgment filed in the district court. Petitioner failed to include her affidavit in the Record Excerpts filed with her appeal in the court below. The relevant factual findings made by the district court are well-supported by the record and have not been challenged or demonstrated as erroneous in the Petition submitted herein.

1. *Petitioner's Employment With The Douglas County Sheriff's Department*

Petitioner was employed by the Douglas County Sheriff's Department as a secretary/receptionist from November 18, 1990 through June 15, 1993. Over the course of her tenure of almost three years, she alleged she was subjected to a hostile work environment based upon her race. In support of this contention, Petitioner was able to identify seven isolated incidents which consist of her allegedly having overheard (1) a racial epithet as part of a conversation between two white inmates in 1990; (2) a conversation between two unidentified white officers discussing the prospect of bringing police dogs into the jail to scare inmates so that they would not bring drugs or cigarettes into the jail; (3) a comment by an unidentified female detective in which a childhood rhyme was recited which contained no racial epithets; (4) a statement made by Major Stan Copeland on an unknown date referencing an inmate in the jail by the term of "black ass"; (5) a discussion in April 1993 involving Detective Scott Cospers in which the phrase "Black Wednesday" (referencing a phrase contained within local media reports describing a boycott of local stores proposed by local black leaders) was made; (6) a reference made at an unknown time to Petitioner as "Buckwheat" by one of her co-workers; (7) and an overheard conversation between Respondent Phil Miller and Petitioner's brother-in-law in which Respondent Miller is alleged to have said "come here, nigger." Petitioner

acknowledged that her brother-in-law, Tim Pounds, an Officer in the Sheriff's Department, explained to Petitioner that the two men were joking around as friends and that *he was not offended* by the remark. The record is undisputed that Major Miller also apologized to Petitioner upon learning that she overheard his statement. The record further reveals that when Petitioner first brought this incident to the attention of Sheriff Waldrop during the course of Petitioner's termination, he promptly took remedial action by speaking with Major Miller and advising him that such comments, even in jest, were inappropriate under any circumstances. (R3-34-3,4,5; Appendix C).

Contrary to the representations contained within the Petition, there is no evidence within the record to indicate that, during the course of Petitioner's employment with Douglas County, Petitioner's direct supervisor, Respondent Lieutenant Tim Brumbelow or Sheriff Waldrop were aware of any complaints of racial harassment made by Petitioner during the course of her leave of absence. In her Petition before this Court, Petitioner misstates the testimony of Lt. Brumbelow. (R4-40). As stated by the district court, "[t]he court has not found any evidence that [Petitioner] previously notified Brumbelow of her complaints regarding these racially derogatory comments." (R4-49-6).

The record of the district court clearly supports its conclusion that Petitioner failed to establish the existence of an atmosphere permeated by racial discrimination. (R4-49-9-10). Petitioner's superiors had neither actual nor constructive knowledge of any racially discriminatory conduct. Moreover, the record clearly establishes that Petitioner failed to bring any concerns she may have had regarding alleged racial discrimination to the attention of Douglas County officials despite her admitted familiarity with Douglas County's policy

prohibiting such discrimination and the avenues for initiating grievances over such matters.

2. *Douglas County's Equal Employment Opportunity Policy And The Merit System*

Douglas County has an Employee Merit System which provides covered employees (including Petitioner) with an administrative procedure by which to appeal any adverse employment actions including, but not limited to, job discrimination and harassment. (R4-49-5-7; R2-19; Statement of Undisputed Facts at pp. 5-8). Petitioner received a copy of the Employee Merit System Handbook at the time she was hired by Douglas County. Petitioner acknowledged an awareness of the Merit System and her grievance rights as a Douglas County employee. (R2-19; Statement of Undisputed Facts at pp. 5-8).

Douglas County also had in effect a written equal employment opportunity policy. This policy was contained in the Douglas County Employee Merit System Handbook and states as follows:

> It is the policy of the County to provide equal employment to all persons and to prohibit discrimination in employment, because of race, color, religion, sex, national origin, creed, ancestry, political affiliation, physical handicap or age. This policy applies to and is a basic part of every aspect of the County's personnel policy and practices in the employment, development, advancement and treatment of employees.

(R2-19; Statement of Undisputed Facts at pp. 8-9).

In addition to appearing in the employee handbook, which was provided to Petitioner at the inception of her employment

with Douglas County, the policy is also posted on bulletin boards at the Douglas County Board of Commissioner's Office and in the Sheriff's Department where Petitioner worked on a day-to-day basis. In her deposition, Petitioner acknowledged that she never made a written or verbal complaint of any alleged racial discrimination or alleged racially hostile work environment during the course of her employment. The first and only complaint made by Petitioner regarding the treatment of employees on the basis of race was made on June 14, 1993 when she met with Sheriff Waldrop to discuss her proposed termination. (R4-49-6; R2-19; Statement of Undisputed Facts at p. 9; Petitioner's deposition at pp. 90-91, 169-172, 382, 389).

3. *Petitioner's Termination From Employment With Douglas County*

Petitioner's employment with Douglas County was suspended on June 10, 1993 when she left work early without permission from her supervisors. Petitioner based her request to leave early on the grounds that she had heard Major Miller address a white co-worker as "meanie," a comment which Petitioner acknowledges was *not* racially derogatory. Major Miller determined Petitioner's leave request was unjustified under the circumstances and denied her permission to leave work for the remainder of the day. Petitioner was, however, allowed to leave for lunch early, after which she failed to return to work. (R2-19; Statement of Undisputed Facts at pp. 12-14). Petitioner has not challenged the occurrence of her misconduct upon which her termination was based or that her insubordination was a terminable offense within her workplace.

On June 14, 1993, Petitioner met with Sheriff Waldrop to discuss her proposed termination resulting from her absence without leave. Petitioner offered no explanation for her absence but acknowledged that her leave was without permission from

her supervisors. For the first time, Petitioner complained to Sheriff Waldrop regarding a comment she had overheard earlier that year. Petitioner reported that she had overheard Major Miller say "come hear, nigger," to Petitioner's brother-in-law, Tim Pounds. Based on Petitioner's record of poor attendance and her acknowledgment of her absence without leave, her employment with Douglas County was terminated effective June 15, 1993. (R2-19).

Following his June 13, 1993 meeting with Petitioner, Sheriff Waldrop investigated Petitioner's allegations concerning Major Miller's use of a racial epithet. Major Miller acknowledged making the comment and explained that it was made in jest with Officer Tim Pounds, Major Miller's long-time friend. Major Miller further explained that the comment was not intended to have been overheard by Petitioner and that he had previously apologized to Petitioner about the incident. Petitioner acknowledged in her deposition that Major Miller had apologized to her and, further, that Officer Tim Pounds had told her that the comment was a joke and that he reciprocated to Major Miller in a similar manner. (R4-34-5; R2-19; Petitioner's deposition pp. 354-55). Sheriff Waldrop instructed Major Miller to refrain from the use of any racial epithets in the future, whether in a joking manner or otherwise. (R2-19).

SUMMARY OF ARGUMENT

The undisputed record in this case substantiates the decisions of the Eleventh Circuit and the district court that Petitioner failed to present sufficient evidence to allow her claim of a racially hostile work environment to go forward. The lower courts concluded, based upon a review of the evidence in its entirety, that the conduct serving as the foundation of Petitioner's complaint failed to establish an environment of

pervasive and unlawful race discrimination. Moreover, Petitioner has failed to allege or demonstrate any tangible employment action taken against her by any individual who allegedly harassed her. The evidence further demonstrates that Petitioner failed to place Douglas County on notice of her complaints of racial discrimination. The record fails to provide any reasonable explanation for Petitioner's failure to utilize the grievance mechanisms which had been provided. Absent such evidence, Douglas County cannot be held liable for any alleged harassment perceived by Petitioner.

The evidence in this case demonstrates that there is an absence of any material facts that would allow this case to proceed to trial. Summary judgment was appropriate as a matter of law.

ARGUMENT AND CITATION OF AUTHORITY

A. Petitioner Has Failed to Establish A Hostile Work Environment Based On Race

The record in this case compels the conclusion that Petitioner has failed to create a triable issue of fact regarding her claim of racially hostile environment.[1] In order to prevail on a claim for hostile work environment based upon racial discrimination, a Plaintiff must allege and prove the following: (1) she belonged to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based upon her race; and (4) the harassment complained of affected a term, condition or privilege of her employment and

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1. The Court has not previously directly addressed whether a cause of action for *racial* harassment exists until Title VII. However, in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 236, 105 L. Ed. 2d 132 (1989), the Court intimated that racial harassment is actionable under Title VII. *Id.*, 491 U.S. at 180, 109 S. Ct. at 2374.

was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive work environment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993), the Court confirmed that not all offensive conduct in the employment setting violates Title VII. Unless the conduct complained of is "so severe or pervasive that it create[s] a hostile environment abusive to employees," such conduct will not be violative of Title VII. *Harris*, 510 U.S. at 22, 114 S. Ct. at 370. The Court made very clear that conduct that is merely offensive will not be actionable. Only severe misconduct that undeniably affects the working relationship will be in violation of the law. Specifically, "The 'mere utterance of an . . . epithet which engenders offensive feelings in an employee' " will not violate Title VII. *Harris*, 510 U.S. at 21, 114 S. Ct. at 370 (quoting *Meritor*, 477 U.S. 67, 106 S. Ct. 2399, 2405 (1986)).

Recently, this Court has again delved into the contours of hostile environment discrimination claims. *Burlington Industries, Inc. v. Ellerth*, __ U.S. __, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). In these two cases, the Court provided welcome guidance as to an employer's possible liability for alleged sexual harassment in the work place. Unlike the present case, the *Burlington* and *Farragher* cases brought before the Court a finding from the district court that the harassing conduct at issue was severe and pervasive. *Burlington Industries, Inc. v. Ellerth*, __ U.S. __, 118 S. Ct. at 2265; *Farragher v. City of Boca Raton*, __ U.S. __, 118 S. Ct. at 2281. The record in the instant case reveals that the district court made no such finding based upon the facts presented. To the contrary, the record is clear that, construing the facts most favorably to the Petitioner, that the Petitioner was subjected

only to isolated comments over a three-year time frame. Moreover, the vast majority of the comments upon which the Petitioner has sought to base her claim for liability were neither directed towards her, nor were they reasonably capable of a racially derogatory interpretation. Petitioner's claims must fail, in the first instance, based upon her failure to demonstrate sufficient severity or pervasiveness of the conduct now at issue. *See Harris v. Fork Lift Systems, Inc., supra.* Summary judgment in favor of the Respondents was appropriate.

In the instant case, the Petitioner's allegations simply do not support a hostile work environment claim. Petitioner cites seven comments that she contends support her claim for hostile environment. Petitioner contends these seven comments were made over a two and one-half year period. Petitioner contends she heard the following comments:

(1) A discussion between two unidentified white *inmates* from the jail talking. Petitioner claims one inmate said, "Let the niggers do it." Petitioner contends this comment was made immediately after she transferred to the Sheriff's Department in November 1990.[2] (R2-19; Petitioner's Dep., pp. 61-62, 65-66);

(2) An overheard conversation between two unidentified white male officers discussing taking police dogs into the jail cells and heard one say they were going to "scare them" with the dogs so that no one would bring cigarettes or drugs into the jail. Petitioner contends this comment was made immediately after she transferred to the Sheriff's Department in November, 1990. (R2-19; Petitioner's Dep., pp. 68-70);

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2. Although not addressed by the courts below, the majority of the comments upon which Petitioner bases her claims are clearly time-barred.

(3) Petitioner claims she heard an unidentified female detective say, "eenie, meenie, miney, mo, catch a 'blank' by the toe" (no racial epithet was used). Petitioner does not recall when this comment was allegedly made. (R2-19; Petitioner's Dep., pp. 73-75);

(4) Petitioner claims she heard Major Stan Copeland use the term, "black ass" in referring to an inmate in the jail on one occasion. Petitioner does not recall when this comment was allegedly made. (R2-19; Petitioner's Dep., pp. 108-109);

(5) During a discussion about taking Petitioner to lunch for Secretary's Day, Petitioner contends a detective, Scott Cospers, used the phrase, "Black Wednesday," which Petitioner acknowledged was a reference to a story in the local news concerning a boycott of local stores proposed by local black leaders. The boycott was to take place on Wednesdays. Petitioner contends this comment was made in April 1993. (R2-19; Petitioner's Dep., pp. 92-95, 97-98; Petitioner's Answers and Objections to Defendants' First Interrogatories, No. 28);

(6) Petitioner contends a co-worker, Billy Lashley, called her "Buckwheat," which Petitioner claims was a reference to a character on a television program, "Our Gang." Petitioner could not state when this comment was allegedly made. (R2-19; Petitioner's Dep., pp. 104-105, 299-301); and

(7) Petitioner overheard Major Phil Miller say, "Come here, nigger," to Tim Pounds when Major Miller and Tim Pounds were joking around. Petitioner contends this comment was made sometime in 1993. (R2-19; Petitioner's Dep., pp. 98-103).

The district court found that these alleged comments, viewed in the totality of circumstances in which they were alleged to have occurred, were insufficient to impute constructive knowledge of a racially hostile environment to Douglas County (R4-49-10).

As a threshold matter, Petitioner's claims are focused upon comments that were generally not directed at her. In those limited instances Petitioner alleges the comments were directed at her, they have no direct or logical racially discriminatory meaning. In order for Petitioner's claims to be actionable, the claimed harassment must be severe or pervasive. *Burlington Industries, Inc. v. Ellerth*, __ U.S. at __ , 118 S. Ct. at 2265; *Harris*, 510 U.S. at 21, 114 S. Ct. at 370.

With regard to the first comment, this comment was not directed to Petitioner or intended to refer to her. The comment was allegedly made by an unidentified white *inmate* from the jail during a conversation with another inmate and was not made by or in the presence of an officer of the Sheriff's Department. (R2-19; Petitioner's Dep., pp. 60-62, 65-66). Petitioner herself characterized this comment as "horse-play." (R2-19; Petitioner's Dep., pp. 66-67).

Petitioner contends the second comment was made in the Detective Division near the door leading to the jail and admits she does not know the names of the individuals who made the comment and admits this statement was not made to her directly but rather that the individuals were talking among themselves. (R2-19; Petitioner's Dep., p. 70). Petitioner interpreted this comment to be racially offensive when, in fact, the comment did not contain any reference to race at all. Petitioner offered absolutely no evidence to suggest that the two officers intended this incident to be racially offensive. To the contrary, Petitioner admits the officers were discussing turning dogs loose in the jail *to search for drugs*. (R2-19; Petitioner's Dep., pp. 68-70).

The third comment which Petitioner contends was racially offensive is the "eenie, meenie, miney, mo" comment. With regard to this comment, Petitioner testified:

> I remember one of the detectives going, "who's gonna do . . ." Like, "Who's gonna do an assignment," or something, and they go, "Eenie, meenie, miney, mo, catch a 'blank' by the toe," and it's — because I was standing there, the person used the word "blank" and kept going.

(R2-19; Petitioner's Dep., p. 73).

When asked why she considered this comment to be racially derogatory, Petitioner stated:

> A. (by Petitioner) Well, because that little slogan, "Eenie, meenie, miney, mo, catch a 'blank' . . . ," usually the "blank" is filled in with "nigger," and I knew that. But, she said, "blank," instead of saying the word, and I found it very offensive.

(R2-19; Petitioner's Dep., p. 74). Again, Petitioner could not state who made the comment, could not state who was standing there or who heard the comment, and did not complain to anyone that she found this comment racially offensive. (R2-19; Petitioner's Dep., pp. 74-75).

Petitioner further contended that the use of the term "Black Wednesday" was racially offensive and demonstrates a racially hostile environment at the Sheriff's Department. Petitioner acknowledged that this comment referenced a day when black residents were planning to boycott certain local merchants. The comment was made in reference to scheduling the day on which Petitioner would be taken to lunch by her co-workers for Secretaries Day. (R2-19; Petitioner's Dep., pp. 92-93).

Petitioner also relies upon a private comment made by Major Miller to Tim Pounds. Tim Pounds is a black officer at the Sheriff's Department and is Petitioner's brother-in-law. (R2-19; Petitioner's Dep., p. 99). Major Miller apologized to Petitioner for making the comment. Petitioner admitted that Major Miller said he was sorry that Petitioner heard the remark that Miller made to Tim Pounds. (R2-19; Petitioner's Dep., pp. 354-355; Miller Dep. pp. 29-30). Petitioner also discussed this incident with Tim Pounds that evening, and Tim Pounds told her that the comment was a joke and he "did Phil Miller the same way." (R2-19; Petitioner's Dep., pp. 99-100, 102). Clearly, Major Miller's comment was not made to Petitioner or in reference to her and, therefore, does not demonstrate a racially hostile work environment. The fact that the comment was not objectively hostile to the Petitioner also is reflected by the fact that Petitioner did not complain to Sheriff Waldrop about Major Miller's comment until much later when she met with Sheriff Waldrop on June 14, 1993, to discuss her suspension and proposed termination. When she made Sheriff Waldrop aware of the comment, Sheriff Waldrop discussed this incident with Major Miller. Although it was clear that the comment was of a private, consensual nature between two long-time friends and was inadvertently overheard by the Petitioner, Sheriff Waldrop emphasized to Major Miller that the use of any racial comments, even in jest, was inappropriate in the office. (R2-19; Waldrop Dep., p. 20; Waldrop Aff.).

Petitioner also contends that a non-supervisory co-worker, Billy Lashley, called her "Buckwheat." According to Petitioner, Lashley was standing near her desk, talking with the other secretary, Donna Hartsfield, and when Petitioner walked past him, Lashley said, "Hey, Buckwheat." (R2-19; Petitioner's Dep., p. 105). Petitioner contends this took place in the Investigations Division near her desk and admits that no one heard the comment other than the other secretary, Donna

Hartsfield. Petitioner admits that she *never complained* about the alleged comment from Lashley until she filed her Charge of Discrimination with the EEOC. (R2-19; Petitioner's Dep., p. 107).

Petitioner contends that she heard Major Stan Copeland use the phrase "black ass" on one occasion, when referring to an unidentified black inmate. Petitioner could not recall when Stan Copeland used this phrase and could not identify the inmate to whom Copeland was supposedly referring. (R2-19; Petitioner's Dep., pp. 108-109). Petitioner also contends that she heard unidentified trustee inmates use the word "nigger," but offers no specifics regarding when this occurred, to whom the inmates were supposedly referring, or who heard the inmates use this word. (R2-19; Petitioner's Dep., pp. 109-110).

Reviewing Petitioner's "evidence" of an alleged hostile environment, it is clear that virtually all of the comments were either not racially offensive, or were ambiguous at best. Also, virtually all of the comments were *overheard* by Petitioner during private conversations, including conversations by inmates. These comments were not sufficiently "severe" to constitute an abusive working environment or so "pervasive" or frequent as to have altered the condition of Petitioner's employment.

In order to establish a claim for hostile environment through comments, it is axiomatic that the comments must be *frequent and severe*, and must be examined carefully to determine whether they were *physically threatening or humiliating*, or just mere offensive utterances. *Harris*, 114 S. Ct. at 371. As the Court in *Harris* emphasized, Title VII was not intended to police every private conversation made between co-workers, and indeed, courts have recognized that a few isolated or stray derogatory comments do not give rise to a cause of action for damages under Title VII.

In this case, of the seven comments relied upon by the Petitioner, in three instances, she failed to even identify who allegedly made the comments. Four of the comments *do not even reference race* and, by any objective measure, do not constitute a racial comment. Distilled to their essence, Petitioner's claim of hostile environment center upon (1) the alleged comment by two white inmates in November, 1990; (2) a comment by Mr. Lashley; (3) the "Black Wednesday" secretary's luncheon and (4) the comment by Mr. Miller to Tim Pounds. These incidents, individually or taken together, do not form the type of frequent and pervasive comments necessary to state a hostile environment claim. *Harris*, 510 U.S. at 21.

B. Douglas County Cannot Be Vicariously Liable For Petitioner's Allegations Of Racially Hostile Work Environment

In the *Ellerth* and *Faragher* decisions this Court held that an employer is entitled to an affirmative defense to liability and damages in those cases where the victim suffered no tangible employment action by the alleged harassing supervisor. The employer may establish this affirmative defense by establishing that,

> (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 118 S. Ct. at 2270. In the case at bar, Douglas County has established its entitlement to avail itself of this affirmative defense.

Douglas County implemented and maintained a policy that it does not condone or permit unlawful discrimination. This policy and the Douglas County Merit System provide a mechanism for employees to report their grievances, including any alleged unlawful or unwelcome conduct. (R2-19; Turner Aff., Ex. 1; Douglas County Merit System, Sections 13-16 and 13-50). Notwithstanding this policy and the related grievance procedures provided under the Douglas County Merit System, it is utterly without dispute that Petitioner failed to timely complain about any of the alleged incidents upon which she now relies to show a triable issue of hostile environment. (R2-19; Petitioner's Dep., pp. 90-91, 235, 241, 382).

Even in her termination meeting with Sheriff Waldrop, Petitioner did not say she was discriminated against or harassed based upon her race. Thus, it is completely without dispute that the Petitioner never utilized the available grievance procedure to report her alleged concerns of racial harassment. Therefore, Douglas County is entitled to an affirmative defense insulating itself from liability as a matter of law for Petitioner's claim of hostile environment based on race.

CONCLUSION

The district court properly granted summary judgment to Douglas County. Both here and in the proceedings below, Douglas County respectfully submits that the record has presented substantial evidence demonstrating that Petitioner failed to raise a genuine issue of material fact requiring resolution by trial. The overwhelming weight of the evidence amply demonstrates that Petitioner failed to establish facts sufficient to support a finding of a hostile work environment based upon her race. Moreover, Petitioner has equally failed to overcome the affirmative defense established by Douglas County as authorized by this Court's most recent decisions in this area.

The Respondents respectfully request that the instant Petition be denied and the decisions of the lower courts granting summary judgment in their favor be upheld in their entirety.

Respectfully submitted,

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